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**In the**  
**Supreme Court of the United States**

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**ROY MARTIN MITCHELL,**

*Petitioner,*

*vs.*

**ELOISE BEARD, as Administratrix**  
**for the Estate of Jeff Beard,**

*Respondent.*

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**PETITIONER'S REPLY TO RESPONDENT'S  
BRIEF IN OPPOSITION TO THE  
PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**STATEMENT**

Pursuant to Rule 24, Rules of the Supreme Court of the United States, this Reply is filed for the express limited purpose of answering respondent's argument, first raised in its answering brief, that petitioner may not pursue the issues which he raises in his Petition.

**INTRODUCTION**

Respondent's major contention against Mitchell's Petition for Writ of Certiorari is the inconsistency between

Mitchell's arguments in the Court of Appeals and his arguments here. Beard's Estate neglects to mention, of course, that it argued in the Court of Appeals that federal common law should govern the right of survivorship and that it now takes a position diametrically opposed to that stance.

Beard's Estate further ignores the thrust of Mitchell's argument. If the Court of Appeals was correct in holding that *Bivens*-type claims are analogous to no state cause of action and, of necessity, should not be considered against the background of tort liability, then uniform federal law is required to govern all phases of a *Bivens*-type claim, including the right of survivorship and period of limitations.

Mitchell's Petition, moreover, is not limited to the questions of the adoption of uniform federal rules to be applied to *Bivens*-type claims. Rather, petitioner's argument for the adoption of a uniform statute of limitations (based upon the Federal Torts Claims Act) and a uniform right of survivorship (based upon the 1871 Civil Rights Act) supports the District Court's judgment.

As the prevailing party in the District Court, Mitchell was under no obligation to raise these arguments in support of his judgment, particularly when they would have been rejected by the appellate court.<sup>1</sup> Further, as

<sup>1</sup>As noted by respondent, in *Baker v. F&F Investment*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970), the Seventh Circuit rejected the adoption of a federal statute of limitations in Civil Rights Act cases. As this Court held in *Youakim v. Miller*, 425 U.S. 231, 235 (1975), a petitioner is not required to raise an issue as a separate ground for decision when it would appear that the ground would have been rejected.

the prevailing party, Mitchell may now raise any argument supporting the District Court's judgment.

Beard's Estate also urges that the only facts before the Court are those facts alleged in its Complaint, while, in its brief below, it stated that most of the facts contained in the Complaint are taken from *United States v. Robinson*, 503 F.2d 208 (7th Cir. 1974), *cert. denied*, 420 U.S. 949 (1975), thus, in effect, inviting that Court to review the record of *Robinson*.<sup>2</sup>

#### **THE ISSUES PRESENTED BY MITCHELL'S PETITION ARE PROPERLY BEFORE THE COURT**

Beard's Estate contends that, because these questions were not argued by petitioner before the Court of Appeals, Mitchell may not address the issue of whether that Court erred in failing to adopt a uniform federal right of survivorship and statute of limitations to govern *Bivens*-type claims. It is difficult to understand respondent's concern in that it specifically appealed the question of the applicability of federal common law in the *Bivens* context.

Respondent also objects to Mitchell's questions relating to the applicability of Indiana law, again on the ground that the issue was not raised below. The Complaint, however, alleges that Beard was killed in Indiana. Surely, that State's laws regarding survivorship and limitations are properly before this Court in light of the fact that

<sup>2</sup>Eloise Beard, Administratrix for respondent, testified at Robinson's criminal trial as did most of the witnesses who would likely be called to testify if the instant case proceeded to trial. Hence, the facts established by sworn testimony and exhibits in *Robinson* are extremely relevant to the Court's consideration of this Petition.



Beard's Estate could have brought this claim in Indiana. Moreover, it is well settled that the Court may examine any evidence in the record, whether called to the attention of the lower court or not, which is relevant to the correctness of that court's decision. *Marconi Wireless Co. v. United States*, 320 U.S. 1, 44 (1942); *Muncie Gear Co. v. Outboard Motor Co.*, 315 U.S. 759, 766-8 (1941).

Petitioner concedes that he has not previously urged the adoption of a federal common law and that he has argued that the two-year Illinois statute of limitations would best effectuate the federal policy established by this Court in *Bivens*.<sup>3</sup> He continues to assert the latter issue here. However, he now also offers an argument which the Seventh Circuit has uniformly rejected in the past and which, considering that Court's prior pronouncements, certainly would have been rejected in this case below: namely, the compelling necessity of applying a uniform body of federal common law in *Bivens*-type cases.

In urging its position, Beard's Estate ignores the fact that this Court will consider issues neither raised nor considered by the Court of Appeals where the court below has made errors of a fundamental or jurisdictional character, *see, Gila Valley Ry. Co. v. Hall*, 232 U.S. 94, 98 (1913); *Grant Bros. v. United States*, 232 U.S. 647, 660 (1913); *Magruder v. Drury*, 235 U.S. 106, 113 (1914), or where the case presented for review is an exceptional case, *Duigan v. United States*, 274 U.S. 195, 200 (1926);

<sup>3</sup> In so doing, petitioner noted that a *Bivens*-type claim is now covered under the Federal Tort Claims Act and, accordingly, the Illinois period of limitations for a claim analogous to a similar claim brought under the Federal Tort Claims Act should govern this action. *See Respondent's Supp. App.* at 24, 25.

*Youakim v. Miller*, 425 U.S. 231 (1975). *See also* Wolfson & Kurland, *Jurisdiction Of The Supreme Court Of The United States* § 418 (1951).

# **I. THE DECISION OF THE SEVENTH CIRCUIT IS BASED UPON FUNDAMENTAL ERROR.**

As noted in Mitchell's Petition, the holding of the Court of Appeals overturns 29 years of decisional law in the Seventh Circuit and ignores all relevant decisions of the Court since *O'Sullivan v. Felix*, 233 U.S. 318 (1913). If that decision is correct, it marks a fundamental change in established law. If incorrect, the decision is grounded in a fundamental misinterpretation of the law. In either event, review by the Court is appropriate before requiring Roy Martin Mitchell to defend a costly and protracted trial of this matter and the appeals which would surely follow.<sup>4</sup>

The Seventh Circuit's error here is two-fold: first, it necessarily rejects the holding of *Monroe v. Pape*, 365 U.S. 167 (1963) that constitutional violations must be considered against the background of tort liability; and second, it fails to establish any sensible ground rules for the new creature it spawned.<sup>5</sup> Accordingly, Mitchell's request for review of that Court's decision is quite proper.

<sup>4</sup> *See Ecker v. Western Pacific R. Corp.*, 318 U.S. 448, 489 (1942), where the Court held that, in the interest of judicial economy, it would review an issue fully presented by petition for certiorari, but which was not passed on by the Court of Appeals where a review of that issue was essential to a complete review of the District Court's judgment.

<sup>5</sup> As noted in the Petition, the Circuit looked to an underlying state claim to hold that Beard's Estate's action survived, while, at the same time, it looked to Illinois' "catch-all" statute of limitations because it held that a *Bivens* claim is analgous to no state cause of action.

## II. THE CIRCUMSTANCES OF THIS CASE JUSTIFY ITS TREATMENT AS AN EXCEPTIONAL CASE.

The Court has long held that it will review questions not raised or argued below in exceptional cases. Thus, in *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 411 (1946), the employer petitioners were allowed to object to a jury instruction even though they had not timely objected to the charge. Likewise, in *Terminiello v. Chicago*, 337 U.S. 1, 9 (1947) (Frankfurter, J. dissenting), the Court overturned a conviction for breach of peace on a ground not raised by petitioner in the Illinois courts, not made the basis of the petition for certiorari, and expressly disavowed by petitioner before the Court. And, in *Blonder-Tongue v. University Foundation*, 402 U.S. 313 (1970), the Court overruled *Triplett v. Lowell*, 297 U.S. 638 (1936), despite the fact that both parties argued for its retention and agreed that it was the applicable law.

In *Youakim v. Miller*, *supra* at 234, 235, four criteria were defined to determine whether a case will be treated as exceptional. The instant case meets all four in that (1) the issues of the application of a uniform federal right of survivorship and statute of limitations are not foreign to the subject matter of the Complaint; (2) those issues could have been pursued under the pleadings filed in the case; (3) if petitioner relied on them as separate grounds for decision, those grounds would have been rejected by the Circuit; and (4) since the case was argued before the Court of Appeals, the Fifth Circuit, in *Shaw v. Garrison*, 545 F.2d 980 (5th Cir. 1977), has determined that there is a federal common law right of survivorship and this Court has granted certiorari to

decide that issue, *Robertson v. Wegmann*, No. 77-178 (Dec. 5, 1977).

Perhaps the most famous instance of the Court's application of the "exceptional case" rule is *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1937), where *Swift v. Tyson*, 16 Pet. 1 (1842) was overruled, even though the litigants limited their arguments to whether, under the *Swift* doctrine, Pennsylvania or federal tort law was applicable and whether the evidence showed that plaintiff was guilty of contributory negligence. 304 U.S. at 82 (Butler, J. dissenting).

The procedural posture of *Erie* is nearly identical to the procedural posture of the instant case. In *Erie*, the parties agreed that *Swift* was applicable. Nevertheless, the Court took it upon itself to summarily overrule *Swift* because that case did not serve the purpose for which it was intended. Rather than creating, as intended, a uniform law which would insure that non-citizens in a diversity case would receive equal protection of the law, *Swift* actually introduced grave discrimination by non-citizens against citizens in that it granted the non-citizens the privilege of selecting whether his case would be decided under state law or under the unwritten "general law". The Court would not tolerate such an inequitable state of affairs.

Likewise, the parties here have contended that, under established law, the forum state's statute of limitations should control a *Bivens*-type claim. However, as is readily apparent from this case, a continued acceptance of this proposition will place federal agents in the very same position that citizen defendants occupied prior to *Erie*.



Unless this Court announces a uniform federal right of survivorship and statute of limitations to govern *Bivens*-type claims, federal defendants will be consigned to the same far-reaching and unreasonable discrimination struck down in *Erie*. The fact that Roy Mitchell rather than the Court itself first noticed and raised this issue should not prevent its consideration.

### CONCLUSION

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Beard's Estate sets forth excerpts of the Seventh Circuit's opinion in *United States v. Robinson, supra*, as recognizing the possibility of this lawsuit. That opinion, which was delivered on August 19, 1974, does indeed raise the possibility of a *Bivens*-type claim. What respondent fails to explain, however, is why it delayed until September 25, 1975—more than three years after Beard's death and more than one year after the Seventh Circuit raised the possibility of a claim—to file the instant Complaint.

Whether or not Beard's Estate possibly may have had an actionable claim against Mitchell and the others who worked to bring Beard's murderer before the bar of justice, the unwarranted delay in bringing this action renders it "an unfortunate event in history which has no present legal consequences". *United Airlines v. Evans*, 431 U.S. 553 (1977).

For any and all of the reasons set forth in Mitchell's Petition for Writ of Certiorari and in this brief, Peti-

tioner respectfully requests the Court to grant his Petition.

Respectfully submitted,

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